JAMAICA

IN THE COURT OF APPEAL

R.M. CIVIL APPEAL No. 96 of 1971

BEFORE: The Hon. Mr. Justice Fox, Presiding.
The Hon. Mr. Justice Graham-Perkins J.A.
The Hon. Mr. Justice Robinson J.A.

LUKIE REID	PLAINTIFF / APPELLANT
vs.	
LYNDEN SYLVESTER and THE ATTORNEY GENERAL	DEFENDANTS / RESPONDENTS

D. Scharschmidt for Plaintiff/Appellant.

Mrs. Shirley Playfair for Defendants/Respondents.

Heard: March 1; April 14, 1972

FOX, J.A.

This is an appeal from a decision of His Honour Mr. I.O. Farquharson, Resident Magistrate Saint Ann, whereby he gave judgment for the defendants in an action claiming damages for false imprisonment and malicious prosecution. The defendant Sylvester is a special constable attached to the Ocho Rios branch of the Jamaica Constabulary Force. At about 8 a.m. on 21st August, 1969 he commenced patrol duty along the main road at Pineapple Place in Ocho Rios. In this area, there are shops on both sides of the road, and a shopping centre with many shops. Off the main road, there are also stalls in which pedlars may vend their wares. A large part of the persons who frequent Pineapple Place are tourists. They go there to shop. They come on foot or by taxicab. The road in that vicinity is narrow. On one side there is no sidewalk. The road on that side goes up to a wall. Amongst the duties assigned to constable Sylvester, - perhaps his chief duty that day - was one which required him to ensure the free and safe flow of pedestrians and motorists along the road. In particular, he had been given instructions to keep the road clear of pedlars. Pedlars posed a particular problem. Some did their selling in the stalls. Others walked up and down or stood in the road and sold. These were the ones that gave the police trouble. The plaintiff was one such troublesome pedlar. At about 10 a.m. on 21st August, 1969 constable Sylvester

saw him standing in the road and bargaining with tourists for the sale of hats which he held in his hands. The constable told him to get off the road with the hats "because it is going to cause accidents". The constable explained that he so instructed the plaintiff "because tourists and other pedestrians not interested in hats has (sic) to step out in middle of road". The plaintiff walked away, but when the constable continued his patrol and proceeded further up the road, the plaintiff returned to the same spot. At about 3 p.m., as a result of the concerted efforts of the police including constable Sylvester, the roadway was cleared of all pedlars except the plaintiff. At that hour constable Sylvester saw the plaintiff standing in the road about 3 feet from the wall which is on one side, and at the same spot where he had been spoken to in the morning. In his hands were hats which he was offering for sale to tourists. The road was busy and there was a heavy flow of traffic. In his evidence the constable said "I saw plaintiff stretch hand with hat to tourist. Plaintiff caused congestion in road. Time after time cars had to slow their brakes to avoid hitting down people who stepped out in road." Constable Sylvester arrested the plaintiff. He told the plaintiff;- "Lukie Reid, I arrest you for blocking the free passage of the main road and causing congestion of traffic". The plaintiff refused to go into a police landrover. Through the joint efforts of an Inspector and a sergeant of police and constable Sylvester his resistance was overcome. He was put into the vehicle and taken to the Ocho Rios police station. That same afternoon, the plaintiff was released on bail. On the following day constable Sylvester swore to two informations charging the plaintiff for that he,

(a) did unlawfully and negligently interrupt the free passage of persons along the main road contrary to section 25(9) Cap. 231 and

(b) unlawfully did hinder this complainant he being a member of the Jamaica Constabulary Force in the execution of his duty as such contrary to section 36 Cap.72.

The plaintiff was tried in the Petty Sessions Court at Ocho Rios on 3rd February, 1970, found not guilty on both informations, and discharged.

The foregoing is a condensation of the evidence of constable Sylvester of the events which occurred on August 21, 1969. The magistrate believed the constable. This involved a rejection of the plaintiff's allegations that when he was arrested, he was sitting on the wall talking to a friend, and that the hats which he was selling to tourists were resting on

the ground on the side of the wall away from the street. In his reasons for judgment, the magistrate specified his findings of fact thus:

"(1) That the plaintiff is a curio vendor in that he is a seller of straw hats.

(2) That the plaintiff sold his hats previously at Dunns River Falls but latterly sold them at Pineapple Place, Ocho Rios.

(3) That it appears that the first named defendant had spoken to the plaintiff on occasions about his selling his hats at Dunns River Falls and that is the reason why the plaintiff changed his venue to Pineapple Place for selling his hats.

(4) That the first defendant, a special constable was assigned for duty to keep the street free from pedlars and to prevent congestion in the street caused by curio vendors when selling their goods to Tourists.

(5) That the first defendant was assigned to Dunns River Falls and Pineapple Place for the purposes of his duties.

(6) That I accept the first defendant's version of what occurred on the 21st of August, 1969 at Pineapple Place in preference to the plaintiff's.

(7) In particular I find that when the first defendant arrested the plaintiff he said to him "Lukie Reid I arrest you for blocking the free passage of the main road and causing congestion of traffic". I do not accept the plaintiff's evidence in this regard when he said this "I know why defendant Sylvester held me and put me in jeep. He put me in jeep because I made a complaint to the M.P." This appears to be a mere surmise on the part of the plaintiff. There is no evidence that anyone gave this as the reason. I make this comment despite the fact that it appears to be a fact that the plaintiff did make a complaint to Mr. Wills Isaacs M.P. who accompanied him to Ocho Rios police station where a complaint was made to Corporal Holmes."

The essential complaint on appeal is based on the contention that the arrest of the plaintiff was illegal in that it was not authorized by section 27 of the Main Roads Law, Cap. 231 which empowered a constable to take into custody without a warrant "any person who is guilty in their sight of any of the offences specified in section 25 of this law." This was so, submitted Mr. Scharschmidt, as a consequence of the provisions of section 27 (3) which is in the following terms:

"(3) No person shall be liable to be arrested under this section if, on demand, he shall give his name and address unless the constable or other person having power of arrest under this section has reason to believe and believes the name and address given to be false."

As a condition precedent to the exercise of the constable's powers of arrest under the section, - so ran the argument - he must first demand of the offender, his name and address. It was only if the offender failed to give these particulars on demand, or if the constable had "reason to believe and believes the name and address given to be false" that the offender became liable to be arrested. This was not the situation here. Before he arrested him, Constable Sylvester had not asked the plaintiff for his name and address. The arrest was therefore unlawful. Constable Sylvester was in the same position as was detective Richards in Murphy v. Richards [1960] 2 W.I.R. p.143. Both had acted under a mistaken notion of their powers of arrest under the relevant law. Consequently, like detective Richards, the arrest effected by constable Sylvester was not an "act done by him in the execution of his office," so as to bring him within the protective provisions of section 39 of the Constabulary Force Law, Cap.72. This section provides:

> "39. Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."

Mr. Scharschmidt completed his submissions by a reference to Dumbell v. Roberts [1944] 1 All E.R. 326. In that case, the plaintiff was arrested by police constables and charged with being in unlawful possession of soap flakes contrary to the provisions of a local English Act. The constables had made no attempt to ascertain the plaintiff's name and address. As a result of this omission they had failed to comply with a condition which was stipulated in the provisions of the act which gave them the right to arrest without a warrant. The Court of Appeal (E) held that the arrest was unjustified and that as a result, the plaintiff was entitled to damages in his action against the constables for false imprisonment.

The magistrate did not agree with the contention upon which the complaint on appeal is based. He so construed the provisions of section 27 of the Main Roads Law as to be able to hold that the provisions of sub-section 3 did not require the constable to demand the plaintiff's name and address as a condition precedent to arresting him; but that if the constable

was satisfied that there was a proper case to lay before the court, he was empowered by the section to arrest. In this way, the magistrate avoided the implications of the decision in Murphy v. Richards. When he arrested the plaintiff, the constable had not been mistaken in his belief as to his powers under the law. He was acting within his legal powers and therefore in the execution of his duty, and so entitled to the protection of section 39 of the Constabulary Force Law, Cap. 72. The magistrate went on to hold not only that the plaintiff had failed to prove an absence of reasonable and probable cause for the arrest, but also the affirmative of that proposition, namely that the constable had reasonable and probable cause for the arrest. Finally, the magistrate held that the constable had not acted maliciously. He found for the defendants on both limbs of the action.

I have not found it easy to decide which of the two competing constructions placed upon the provisions of section 27 is the correct one. It could be extremely inconvenient if the police were powerless to arrest a persistent offender. This is the consideration which has led me to think that the approach in the judgment of Robinson J.A.(ag.) to a construction of the provisions of section 27 is correct. I have had the advantage of reading that judgment, and if I may say so with respect, am persuaded to conclude that, for the reasons stated therein, demand of an offender's name and address is not a condition precedent to a constable's powers of arrest under the section. I too, therefore, would be prepared to endorse the ground upon which the magistrate found that the arrest was lawful.

In my view further, however, even if the arrest was unlawful the magistrate's decision is right for a more fundamental reason based upon my opinion that the decision in Murphy v. Richards is wrong. It is a decision of the former court of appeal and as such is entitled to the greatest respect. But it is not binding on this court. If erroneous, it should not now be followed. The facts of that case are simple. Murphy was arrested by detective Richards for unlawful possession of a cow. At his trial, Murphy was discharged by the resident magistrate without being called upon to account for his possession when it emerged that detective Richards had not found him in possession of the animal at the time of arrest. He was not a 'suspected person' as defined by the Unlawful Possession of Property Law, Cap. 401 and his arrest was therefore unlawful. In dismissing the claim for assault and

false imprisonment brought subsequently by Murphy against Richards, the magistrate held that the latter was entitled to the protection of section 39 of the Constabulary Force law, Cap. 72. The magistrate's decision was reversed on appeal. The court held that in arresting Murphy, detective Richards had made a mistake of law as to his powers of arrest, as distinct from a misapprehension of the facts constituting the offence, and that such a mistake of law precluded the detective from claiming that the arrest was an "act done by him in the execution of his office." In coming to this conclusion, the court declined to be guided by the opinion of Beard J. in Solomon v. Adams [1912] 1 Stephens 935 at 939 that

> "so long as the defendants were acting or purporting to act under colour of their office, they must be taken to have been acting in the execution of their office and entitled to the protection of the statute."

Regarding this passage, the court observed that;

> "this decision is one of a single judge sitting in a court of first instance and this court is not bound thereby. In that case, which was one of mistaken identity, the constable made a mistake of fact and not of law." (at p.146).

Further, the court dismissed as "merely obita dicta" the opinion of Clark J. in Cooper v. Cambridge [1931] Clark's Report 336, at 341 that;

> "if a constable, in the intended execution of his office, makes an arrest which can in no way be justified in law then before he can be made liable in damages it must be proved not only that the arrest was illegal but also that he acted with an absence of reasonable cause or maliciously."

The Court took the view that "the true principle governing this question" was to be found in a passage in Maxwell on the Interpretation of Statutes (10th Ed.) pp. 233 and 234. This passage was incorporated in the judgment and is as follows:

> "It is obvious that the provisions in numerous statutes which limit the time and regulate the procedure for legal proceedings for compensation for acts done in the execution of his office by a justice or other person, or 'under' or 'by virtue' or 'in pursuance' of his authority, do not mean what the words, in their plain and unequivocal sense, convey, since an act done in accordance with law is not actionable, and therefore needs no special statutory protection. Such provisions are obviously intended to protect, in certain circumstances, acts which are not legal or justifiable, and the meaning given to them by a

great number of decisions seems, in the result, to be that they give protection in all cases where the defendant did, or neglected, what is complained of, while honestly intending to act in accordance with his statutory powers and, whether reasonably or not, believing in the existence of such facts or state of things as would, if really existing, have justified his conduct.

Thus, if an Act authorised the arrest of a person who entered the dwelling-house of another at night with intent to commit a felony (Larceny Act, 1861 (c. 96), an arrest made in the honest and not unreasonable, but mistaken belief that the person arrested had entered with that intent would be protected. Apparently, however, there would be no protection if the arrest were made under a misconception, not of the facts, but of the law, as, for instance, if the person making the arrest believed that the prisoner had only attempted to enter - a different offence, for which the enactment in question does not authorise arrest - or if, where the law justified an immediate apprehension, an arrest was made which was not immediate. As a general proposition, however, unreasonableness of belief is immaterial, if the belief be honest, though it is an important element in determining the question of honesty."

The authorities given for the proposition which is underlined in the passage are Griffith v. Taylor 36 L.T.5 and Morgan v. Palmer (1824) 2 B&C 729. In the latter case, all the judges appeared to recognize the distinction between an act done 'colore officii', when notice of action as stipulated in the protective statute must be given, and an act in circumstances where "it cannot be pretended that the thing was done in the execution of the defendant's office", (vide Littledale J. at p.738) when no notice is required. This distinction foreshadows the true test for ascertaining whether a person is acting in the execution of his duty which later cases identify as the difference between "honestly intending" and "falsely pretending".

In Griffith v. Taylor Cockburn C.J. purported to lay down the principle in these terms:

"According to the latest authorities on the law as to giving notice of action for an act done in pursuance of this statute, it is laid down that to entitle the defendant to notice of action he must have acted under a bona fide belief in the existence of circumstances, which if they had really existed, would have afforded a justification for what he had done. The decision in cases of this kind turns on the two parts of the clause in sect.103 to which I have referred. The first part relates to the question whether the party arrested

> is found comitting the offence for which he is arrested, as to that part of the section the question of bona fide belief is all essential. The second part relates to the immediateness of the arrest, and as to this the question turns, not on the mind of the person making the arrest, but on his act. When you come to act under a belief in the existence of such a state of facts as would if they existed justify an act done under the statute, there still remains the question whether the act was done in conformity with the statute. If the defendant were acting under a bona fide mistake of fact as to the persons arrested having been found committing the offence with which they were charged, he would, so far as that part of the section goes, be within the protection of the statute, but if he were acting under a mistake as to the meaning of the statute on the question whether the arrest was immediate or not, he would not be protected."

In Murphy v. Richards, the court of appeal quoted this passage with approval, and continued at p.148:

> "We do not think we can do better than adopt the principle as laid down by Cockburn, C.J., to the effect that if in the instant case the respondent bona fide believed in a state of facts that were non-existent and in that honest belief made the arrest he is entitled to the protection of s. 39 of the Constabulary Force Law /J./, but if on the other hand he acted under a mistaken notion as to his powers under the Unlawful Possession of Property Law /J./ he is disentitled to the protection of the section."

The interesting point in the reasoning of the court of appeal which is immediately noticeable is that the substantial principle which the passage in Maxwell sought to illustrate was bypassed. That principle is succinctly expressed at the commencement of the passage in Maxwell which is quoted above, and as well, at p.229 (ibid) as follows:

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."

Instead, the Court of Appeal was attracted by the qualification of the principle, and applied that qualification as the governing consideration

in arriving at its conclusions. It is of interest to note that the passage in Maxwell which was quoted in Murphy v. Richards, though repeated in the 11th edition, was excluded in the twelfth.

A second point of some significance to notice is that the qualification is stated in a sentence commencing with the word 'apparently'. This would seem to import a measure of reserve as to the validity of the proposition. And well might the learned author of Maxwell have been cautious. For as support for the qualification, Morgan v. Palmer is of uncertain authority, and when Griffith v. Taylor is carefully examined it is clear that the dictum of Cockburn C.J. must be regarded as obiter. Nevertheless, nowhere in the judgment of the Court of Appeal is there any trace of hesitancy in applying the dictum of Cockburn C.J.

A third point to notice, and this with some surprise is that although Cockburn C.J. purports to state a view 'according to the latest authorities on the subject' no reference is made in his judgment to any of these authorities. In particular, no authority was given for the 'principle' which the Court of Appeal so willingly allowed to be the governing consideration in Murphy v. Richards. A fourth point, not only of interest, but of decisive importance, is the absence of any reference in Murphy v. Richards to the judgment of the Full Court in Chong v. Miller [1933] J.L.R. 80. In that case, the effect of the provisions of section 10 of the Gambling Amendment Law, 1926, Law 28 of 1926 was considered. Section 10 reads;

> "10 - No action for damages shall lie in any civil court for any act done by any person purporting to act under the provisions of this Law, unless such act be first proved to have been done with express malice."

The relevant phrase in the section is "purporting to act", but having regard to the principles outlined in the passages in Maxwell already referred to, the phrase describes no wider protection than the phrase "act done by him in the execution of his office", in section 39 of the Constabulary Force Law.

In Chong v. Miller, Clark J. puts the matter thus (at p.86)

> "There are a considerable number of cases dealing with the extent of this phrase and of similar phrases used in enactments passed for the protection of persons carrying out public duties.
>
> All the decisions agree that these phrases cannot be construed as meaning that the person to be protected must have been lawfully exercising his rights since, if his act were lawful, he could

> require no special statutory protection. All the decisions agree, therefore, that such enactments are intended to protect persons within their scope whose actions have not been lawful."

The learned judge then posed the precise question which had arisen for decision in Murphy v. Richards. He said:

> "Is such protection nevertheless only to be afforded when the person has acted under an honest mistake as to facts, or is he also to be protected when he acts under an honest mistake as to the law?"

The relevant authorities were then examined. These included Griffith v. Taylor [1876] and the earlier authority of Selmes v. Judge [1871] L.R.6 Q.B. Cases 724. In the latter case it was held that surveyors of highways were not deprived of the protection of a statutory notice of action because they had been mistaken as to their legal duties. The ratio decidendi in Chong v. Miller was stated at pp.87, 88 thus;

> "A person 'purporting to act' under the provisions of Law 28 of 1926, will therefore be entitled to the benefit of Section 10 of that law if either he has acted under an honest belief in the existence of a state of facts which if it had existed would have made his act a lawful one or if he has acted under an honest misapprehension as to his authority under that law to do the act complained of. Where the defendant is a constable and claims to have acted under a bona fide mistake as to his legal powers of arrest this claim should naturally be subject to careful scrutiny before it is accepted. A constable, above all people, may be presumed to know the law as to his own powers of arrest and it can be only in unusual circumstances that any Court would conclude that he was acting in good faith if he acted outside those powers. The question is however simply one of bona fides and must ultimately be a question of fact."

I do not ignore the note of caution which was struck further on in the judgment in these words;

> "Our decision in this case must in no way be taken as authority for any general proposition that a constable may make arrests which are unlawful and yet escape any liability for so doing."

It is clear that this statement was not intended to qualify the test of 'bona fides' for answering the question whether on any particular occasion a constable is acting in the execution of his office. The statement merely emphasises the difficulty which may arise in some situations of maintaining that a constable who has acted illegally was honestly intending to execute his duties,

or had reasonable or probable cause for his actions. Where, as here, an answer to the particular legal point upon which the lawfulness or otherwise of the constable's action depends, is not immediately apparent, the fact that lawyers ultimately conclude that the constable had acted illegally should be allowed very little, if any, significance in deciding these matters.

Applying the ratio decidendi in Chong v. Miller to the facts of this case as found by the magistrate, I have no hesitation in holding that even if it is conceded that constable Sylvester was acting under a mistaken notion of his powers of arrest under section 27 of the main roads law, he was nevertheless honestly endeavouring to discharge his functions as a constable, and is therefore entitled to the protection of section 39 of the Constabulary Force Law.

Mrs. Playfair did not seek to bring the constable under the umbrella of the section on this ground. She submitted that the power to regulate traffic which the constable was instructed and was endeavouring to exercise, was well within the authority given to constables by section 26 of the Constabulary Force Law. The action of the plaintiff at 3 p.m., when considered against the background of his negative response to the orders of the constable earlier that day, constituted a hindering of the constable in the execution of his duty to regulate traffic, and an offence within the meaning of the provisions of section 36 of the Constabulary Force Law. The plaintiff was told the act for which he had been arrested, and was subsequently charged with an offence under section 36. In this situation, so argued Mrs. Playfair, the plaintiff was found committing the offence of hindering a constable in the execution of his duty, and by virtue of the provisions of section 18 of the Constabulary Force Law, had been lawfully arrested. In my view these submissions of Mrs. Playfair are valid, and I accept them.

The magistrate negatived malice in the constable. This was a question of fact for him to determine. There is no ground upon which this finding may be challenged, and indeed, in his submissions before us, Mr. Scharschmidt did not seek to impugn the magistrate's decision on the limb of the claim for malicious prosecution. There was ample "cause (that is, sufficient grounds ...) for thinking that the plaintiff was probably guilty" of the offences for which he was subsequently charged. Consequently the

constable had been given a cause for arresting the plaintiff which was "reasonable and probable" within the meaning ascribed to that phrase by Lord Devlin in Glinski v. McIver [1962] A.C. 726 at 766.

For these reasons I would dismiss the appeal and affirm the judgment of the magistrate.

ROBINSON J.A.(Ag.).

I have had the benefit of reading the judgment of Fox J.A. and entirely agree with his analysis of the judgment in Murphy v. Richards and with his conclusion that that case should no longer be regarded as an authoritative statement of the law relating to the protection afforded to a constable under section 39 of the Constabulary Force Law. I do wish however, to express my considered opinion on the question of a constable's power of arrest under sec. 27 of the Main Roads Law, Cap. 231.

At the hearing of this appeal, Mr. Scharschmidt submitted that a duty is imposed on the constable to demand the name and address of the person whom he is alleging has committed an offence under section 25 of the Main Roads Law and that by virtue of the provisions of section 27(3) of the said law, this duty is a condition precedent to arrest. He said that this is the proper construction of section 27(3) and since this duty was not discharged, the arrest was unlawful. He cited Dumbell v. Roberts and others (1944) 1 AER 326 as "covering the situation in the present case." In that case, the police made an arrest under section 507 of the Liverpool Corporation Act 1921. At the hearing the charge was dismissed. In the subsequent action for false imprisonment, the court held that the arresting constables failed to comply with the condition precedent to the exercise of the right to arrest without warrant as required by the provisions of s.513 of the Act since they made no attempt to ascertain the plaintiff's name and address.

Section 513 provides:-

> "It shall be lawful for any police constable ..... to arrest and detain without warrant any person whose name and residence shall be unknown to such constable and cannot then be ascertained by him and who shall commit any offence against the provisions of this part of this Act."

It is clear that this section imposes a duty on the Constable, as a condition precedent to making an arrest.

Section 513 is in substance similar to section 22 of the Jamaica Town and Communities Act Cap. 384 where a similar duty is imposed on a Constable as a condition precedent to arrest and the section sets out this

condition precedent in similarly clear language.

Section 27(3) of the Main Roads Law Chapter 231 does not set out either in clear language or otherwise, any such condition precedent as is being argued. Further, s.27 does not limit the power to arrest a person found committing an offence which the constable has under sec.18 of Chapter 72. Section 27(3) merely makes a proviso to the section in the language therein set out i.e. provided that "no person shall be liable to arrest if, on demand, he shall give his name and address ....."

The provisions of s.27(3) date back to Law 11 of 1892. Section 2 of that law provides:-

Section 2: "The power of arrest given by Sec 25 of Law 41 of 1887 shall extend to offences on the Parochial Roads as well as to offences on Main Roads, and shall, in the case of offences on either Main or Parochial Roads, extend to cases where, although any such offences has not been committed in view of the Constable, such constable shall be informed by some person known to him that such offence has been committed in the sight of such person, and shall be required by him to arrest the offender:- Provided that no person shall be liable to be arrested under the said section or this section if, on demand, he shall give his name and address, unless the Constable shall have reason to believe and believes the name and address given to be false."

Section 25 of Law 41 of 1887 provides:

25. "The Director of Public Works or any person authorised by him or any Justice of the Peace or Constable, and all persons whom they or any one of them may at any time call to their assistance may take into custody without warrant, to be dealt with according to the provisions of this Law, any person who is guilty in their sight of any of the above specified offences."

The specified offences referred to are set out at Section 24 of that law and is in substance similar to s.25 of the Main Roads Law Chapter 231.

It is clear that in 1887, by Law 41, the constable had "full" powers of arrest. In 1892, the proviso was put in the law exempting from arrest a person liable to be arrested if the Constable demands his name and address and it is given and the Constable has no reason to doubt the correctness of it. If no "demand" is made by the constable, he has his full powers of arrest as he had under Section 25 of Law 41 of 1887 now Section 27(1) of Chapter 231. If the circumstances are such that the constable decides not to make this

"demand" as in this case with a persistent pedlar of goods on the main road (Dunns River and Pineapple Place) then he may arrest under s.27 and clear the roadway which was his duty on that day. If "demand" is not made by the constable, the subsection does not apply.

What does the word "if" mean in the subsection? It means what that word is commonly known to mean and gives the constable a discretion i.e. whether he should go further and get the name and address of the offender and summon him to court or arrest him there and then. The "demand" must come from the constable - the "demand" in the subsection is not in imperative terms and there is no duty or condition precedent to arrest provided for in the subsection as is the case in Section 513 of the Liverpool Corporation Act under which Dumbell v Roberts was decided.

I hold that section 27(3) only applies where "demand" is made and not otherwise. No demand was made in this case and consequently the power of arrest was not qualified or restricted.

Further, it is my opinion that if it was intended to be a duty on constables to "demand" the name and address before the question of arrest arose in all cases, and thus be a condition precedent to arrest in all cases, one would expect to find some provision to that effect in s.27(1) which gives general powers of arrest; the power to arrest would be made expressly subject to the "demand" and would apply in every case and be a condition precedent to arrest in every case i.e. had the section gone on to provide to the effect "and any person who fails to give his name and address on demand."

For the above reasons, I hold that the arrest was lawful.

I would dismiss the appeal and affirm the judgment of the learned Resident Magistrate.

GRAHAM-PERKINS, J.A.:

The appellant claimed against the respondents damages for false imprisonment and malicious prosecution arising out of his arrest by the first named-respondent (hereinafter called 'the respondent'), a special constable, on the 21st August, 1969, and his prosecution thereafter on two informations, one of which charged him with an offence under s.25(9) of the Main Roads Law Cap. 231. The other information charged an offence under s.36 of the Constabulary Force Law Cap. 72. The appellant was acquitted on both informations.

At the trial of the action out of which this appeal arises the learned resident magistrate dismissed the appellant's claim and awarded judgment in favour of the respondent. The appellant does not challenge the dismissal of his claim in respect of his prosecution by the respondent. What he does question is the dismissal of his claim for false imprisonment.

I do not propose to dwell on the evidence already adequately reviewed by Fox, J.A., but rather to examine the two principal questions involved in this appeal. These are:

(i) Did the respondent have any authority to arrest the appellant in view of the provisions of s.27(3) of the Main Roads Law Cap. 231?

(ii) Is the respondent entitled in the circumstances of this case to claim the protection afforded by s.39 of the Constabulary Force Law Cap. 72?

The authority under s.27(3) of Cap. 231.

Section 25 of Cap. 231 catalogues some twenty-nine offences in respect of which s.27(1) confers on a constable, among others, the authority to "take into custody without warrant ..... any person who is guilty in (his) sight of any of the offences" specified therein. All but five of these offences attract a maximum fine of four dollars. Section 27(3) states:-

/"No person .....

> "No person shall be liable to be arrested under this section if, on demand, he shall give his name and address unless the constable or other person having power of arrest under this section has reason to believe and believes the name and address given to be false."

There cannot be the least doubt that this sub-section imposes a restriction on the authority to arrest conferred by the first sub-section. The important question, however, is: "What is the extent and purpose of that restriction? The resident magistrate expressed his conclusion as to the meaning to be ascribed to the sub-section thus:

> "I interpret s.27(3) to mean that if the constable demands from a person (who comes within this definition of the word 'guilty' as interpreted above) his name and address, he can only arrest him if he has reason to believe the name and address given to be false. This section does not require him to demand the name and address. In my view the defendant could, if he is satisfied that there is a proper case to lay before the court, arrest the plaintiff herein."

Is this interpretation of s.27(3) tenable? I think not. I agree that if a constable demands the name and address of a person "guilty in his sight" of an offence specified in s.25 that constable ceases to have the authority to arrest if that person complies with such demand, unless, of course, the constable has some reason to believe and does believe the name and address given to be false. Implied in the magistrate's interpretation, however, is the proposition that an offender's liability to arrest depends on the election by the constable to make or not to make the relevant demand. It is clear, I think, that the first part of s.27(3) does two things. It imposes, in very precise language, a positive prohibition against arrest, and defines in equally

/precise terms .....

precise terms the area in which that prohibition is to operate. This latter it does by the subordinate conditional clause "if, on demand, he shall give his name and address". It is, in my view, of crucial importance to note that this clause does not, either as a matter of grammar or of logic, involve a duality of conditions. It contains a single and indivisible condition and that condition is the giving of a true name and address by the person of whom the constable makes the demand. The ancillary clause (with its subject and predicate understood) "on demand", to whatever verbal refinement and analysis it may be subjected, can only mean 'following or consequent upon, or in pursuance of, a demand made therefor by the constable'. This ancillary clause, quite clearly, does not import or contain a condition, nor can its interposition logically alter the identity and scope of the area within which the prohibition is to operate. If an offender gives his true name and address on demand he complies with the one condition which brings him within the area of operation of the prohibitory provision. That this must be so becomes clear if the ancillary clause is transposed so that the subordinate clause read: 'if he shall give his name and address on demand.' It would appear to be quite unarguable that the one condition which attracts the prohibition is the giving of a true name and address on demand and, very clearly, not the making of the demand. In order to constitute the making of the demand the condition on which the prohibition depends the subordinate clause would have to be read as if it were framed thus: 'if the constable elects to demand his name and address and he complies therewith.' To so read the clause would, in my view, be to do strange violence to its language and to render, to a very large extent, quite meaningless the clause following and beginning with the word 'unless'. It would also offend the principle that in the interpretation of a statute words are not to be construed, contrary to their meaning, as embracing or excluding cases so as to indulge some notion as to what is just or expedient.

/The second .....

The second part of the sub-section provides, in terms equally precise, that notwithstanding the giving of a name and address by the person of whom demand is made the constable may arrest if he has reason to believe and does believe that the name and address so given are false. The clause commencing with the word 'unless' introduces the single circumstance in which the prohibition against arrest is not to operate. For my part I find it quite impossible to read s.27(3) as containing a positive prohibition against arrest in a particular circumstance unless another particular circumstance comes into existence, and, at the same time, as investing a constable, among others, with an absolute right to determine whether he will, in any circumstance, allow that prohibition to operate. It would be an extraordinary conclusion that the legislature intended the protection from arrest given by s.27(3) to depend entirely on the particular idiosyncracies of a particular constable, or other person, who might, or might not, choose to make the relative demand. Any such manifestly absurd consequence must, in my view, be studiously avoided.

I am not the least impressed by the argument predicated on the desirability of an unqualified right in a constable, among others, to arrest a persistent offender. That argument ignores not only the purpose but the presence of the third sub-section in s.27. Let the absence of that sub-section be assumed so that the authority to arrest depended wholly on s.27(1). Proceeding from that assumption it becomes important to note that the authority to arrest conferred by the first sub-section on "the Director, or any person authorised by him, or any Justice or constable" is not expressed in terms which make it obligatory upon those persons or any of them to execute an arrest. A constable, or any of the persons named, may arrest any person guilty of an offence under s.25. This clearly implies that the constable may, instead of arresting an offender, cause a summons to be issued. In the case of a persistent offender a constable would clearly be entitled to arrest without

reference to the true name and address of that offender. In any other case a constable would clearly be entitled to consider the desirability or otherwise of a summons. His decision to arrest or, in the alternative, to proceed by way of summons, would undoubtedly be dictated by the particular circumstances in which he is required to act. If he chose to proceed by summons he would be entitled to demand the name and address of the offender. If that offender refused to disclose his name and address or gave a name and address which the constable had some reason to believe to be false, the latter could certainly effect an immediate arrest. If these results follow from s.27(1), as in my view they certainly do, then one is driven to ask why the legislature thought it necessary to insert the third sub-section. Certainly not to invest a constable and the other persons named with precisely the same discretion they already enjoy under s.27(1). It would seem clear that the legislature intended that a summons should issue in respect of the relatively minor offences enumerated in s.25, except in those cases where the name and address of an offender are unknown to a constable who, having made the demand contemplated, is given a name and address which he has some reason to believe to be false. I am of the firm view that the words "on demand" in s.27(3) impliedly confer a right and a correlative duty on a constable, among others, to demand the name and address of a given offender; they do no more. I hold that a prerequisite to the exercise of the authority to arrest under s.27 is a demand made by a constable followed by the disclosure of a name and address which he has some reason to believe is false. It is, perhaps, not without importance to note that Mrs. Playfair did not seek to argue the contrary. She did argue, however, that even if it be conceded that the arrest of the appellant was not authorised in the circumstances, the words uttered by the respondent on his arrest of the appellant would not confine him within the limits of s.25 and s.27 of Cap. 231, but enabled him to justify the arrest by reference to the Constabulary Force Law Cap. 72. In support of her submission

Mrs. Playfair called in aid the provisions of s.26(1) of Cap. 72. As far as is relevant that sub-section provides:

> "Whenever in the opinion of the Commissioner, a street is liable or likely to be thronged or obstructed, it shall be lawful for him and for any constable acting under his authority -
>
> (iv) generally to do all that is necessary to prevent a congestion of the traffic, and to provide for the safety and convenience of the public."

Sub-section (3) provides:

> "If any person disregards or fails to obey any reasonable order ..... of any constable ...., given with the object of carrying out the provisions of this section, he shall be guilty of an offence ..."

Mrs. Playfair submitted further that it was not without significance that the second information was founded on s.36 of Cap. 72. This information charged that the appellant "unlawfully did hinder this complainant .... in the execution of his duty ..." In my view these submissions, though attractive, are manifestly without merit. The offence created by s.26(3) of Cap. 72 is not the offence of "causing congestion of traffic". The offence is constituted by the <u>disregard of, or the failure to obey, a reasonable order</u> of a constable given with the object of carrying out the provisions of the section. In any event there is no evidence that the respondent disclosed to the appellant that his arrest proceeded from his disregard of, or his failure to obey, any such reasonable order. Indeed the appellant was not so charged and it is clear that the provisions of s.26 were not, at the time of the appellant's arrest, present to the mind of the respondent. As to the second information there is not a scintilla of evidence that the appellant in any way hindered the respondent in the execution of any duty. For the reasons I have set out above I hold that the respondent had no authority to arrest the appellant.

/The protection .....

The protection afforded by s.39 of Cap.72.

This section provides:

> "Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."

In Murphy v. Richards (1959-60) 2 W.I.R. 143, the former Court of Appeal held that where a constable acted under a mistaken notion as to his powers of arrest under a statute he was not entitled to the protection of this section. In arriving at that conclusion the Court expressed its unanimous approval of, and elected to be guided by, a principle enunciated by Cockburn, C.J. in Griffith v. Taylor (1876) 2 C.P.D. at pp. 200 and 201. Let me say here that, like Fox, J.A., I am of the clear view that Murphy v. Richards (supra) was wrongly decided and should not be followed, but I wish to state my own reasons for so concluding.

Where a person consciously does an act in pursuance, or in the execution, of an office by which he is clothed with an authority to act he will, in the ordinary course of things, intend to act in pursuance, or in the execution, of that office. Quite obviously that act may be accompanied by circumstances capable of demonstrating a pretence in the actor to act "under colour of the law" as distinct from an honest intention to act in pursuance or execution of his office. Apart from such a case I am quite unable to detect any distinction between a person who acts in the execution of an office and one who intends - a purely mental state - to act in the execution of that office. Any such alleged

/distinction .....

distinction must necessarily be entirely artificial. If, as I hold, there is no real distinction between acting and intending to act in the execution of an office, on what principle can it be held that an actor who is guilty of a bona fide mistake as to fact is to be regarded, in the context of s.39 of Cap.72, in a different light from the actor who makes a bona fide mistake as to his authority under a particular statute where each acts or intends to acts in the execution of his office. Here again I am unable to appreciate the distinction sought to be established in Murphy v. Richards (supra). As indicated earlier that distinction rested on the judgment of Cockburn, C.J. in Griffith v. Taylor (supra) which, in the Court's view, laid down the principle which had been enunciated in passages appearing in Maxwell on the Interpretation of Statutes (10th Edn. at pp.233 - 4).

It is somewhat unfortunate that Cockburn, C.J. did not disclose any of "the latest authorities on the subject of notice of action for anything done in pursuance of" the statute with which he was dealing, and in which he presumably found some support for his conclusion. It is apparent that the learned Chief Justice did not, in his examination of the "latest authorities", advert to cases such as Selmes v. Judge (1870-71) L.R. 6 Q.B. 724 decided five years earlier. In that case Blackburn, J., with whom Lush and Hannen, JJ. agreed, said, at pp. 727-728:

> " The judge thought that the defendants were not acting under the 5 & 6 Wm. 4, c.50, and that consequently they were not entitled to the notice of action allowed thereby. I agree that if a person knows that he has not under a statute authority to do a certain thing, and yet intentionally does that thing, he cannot shelter himself by pretending that the thing was done with intent to carry out that statute. In this case nothing is stated shewing that the defendants, when they made the rate in question, knew that it

was not allowed by the statute under which they were appointed, and it has not been found that the defendants were trying, under the colour of the law, to get money to which they had no right, in which case they would not have been protected by the Act. The only illegal act done by the defendants was to make an informal rate; they proceeded to collect it and received from the plaintiff the amount assessed upon him; in these transactions it is clear that the defendants intended to act according to the duties of their office as surveyors, although they mistook the legal mode of carrying out their intention. Neither in Hermann v. Seneschal (32 L.J.C.P. 43), nor in Roberts v. Orchard (2 H.& C. 769), was it decided that a defendant would not be entitled to notice of action, because he had been mistaken in the law. In Hardwick v. Moss (7 H. & N. 136) surveyors had obstructed a highway without any statutory authority, but the Court of Exchequer held that as they intended to act pursuant to the Highway Act, they were entitled to notice of action. In Wordsworth v. Harley (1 B. & Ad. 391) the question arose upon a former Highway Act; a very high-handed course had apparently been pursued by the defendant, a surveyor of highways, who took a portion of the plaintiff's field and added it to a public road without the plaintiff's consent: Lord Tenterden, C.J., with the concurrence of the rest of the Court, held that the defendant was entitled to the protection of the Highway Act, although he considered the case to be very unfortunate for the plaintiff. It was assumed in that case that if in repairing highways the surveyor illegally and improperly took a portion of land, he was acting in pursuance of the statute, and might shelter himself under its provisions. In the present case it was the duty of the defendants to collect highway rates, and they intended to act in pursuance of the statute; they were therefore entitled to notice of action."

Selmes v. Judge (supra) was, in 1876, one of the "latest authorities" on the subject of notice of action and those authorities certainly

did not lend any support to the principle enunciated either in Maxwell or in Griffith v. Taylor. There is, in my view, no jurisprudential sanction for holding, as Cockburn, C.J., was apparently prepared to hold, that a bona fide mistake as to the meaning of certain words in a particular section of a statute should entail consequences quite different from those which result from a bona fide mistake as to the meaning of other words in the same section.

But such considerations apart, it is reasonably clear that the real significance and purpose of s.39 of Cap. 72 was to introduce into causes of action against members of the Jamaica Constabulary the elements of malice and the absence of reasonable and probable cause in those cases in which, at common law, those elements formed no part of the cause of action and were not, therefore, matter of pleading. The cause of action in false imprisonment is but one example. At common law a plaintiff is required to do no more than to allege and prove that he was imprisoned. The onus is then on a defendant to justify that imprisonment. Under s.39 a plaintiff is required to allege and prove, as an essential part of his cause of action, that the defendant acted either with malice or without reasonable and probable cause. But whatever the cause of action s.39 quite obviously envisages that the act of a constable of which a plaintiff complains is one capable of giving rise to a cause of action in tort, and that action is required to be brought as if it were an action on the case, hence the necessity for the allegation of malice or an absence of reasonable and probable cause. See, for example, O'Connor v. Isaacs (1956) 1 A.E.R. 513. It was, perhaps, the failure to recognize and identify the true purpose and scope of s.39 that led to the discovery of some supposed distinction between an arrest by a constable which proceeds from his bona fide belief in a "non-existent state of facts" and an arrest resulting from "a mistaken notion" of his authority under a particular statute. It is of some

/importance to .....

importance to note that in Murphy v. Richards (supra) the Court made not the least attempt to examine or to explain the basis of the distinction.

If the essential criterion in resolving the issue whether an act done by a constable is an act done "in the execution of his office" is the lawfulness or unlawfulness of the act, so that an act proceeding from his mistaken notion as to his authority under a particular statute makes it impossible for him to call in aid the provisions of s.39, then it is far from easy to see the purpose of that section since such an act would not, according to Murphy v. Richards (supra), be an act done in the execution of his office. That such an act may be capable of giving rise to a cause of action in tort would be irrelevant. Again, if the act is lawful so that it may be said to be an act done in the execution of his office as a constable it is equally difficult to see the purpose of s.39 since an act sanctioned by the common law or statute law of this country would hardly be capable, in the absence of negligence, of giving rise to an action on the case in tort. If the constable is guilty of a bona fide mistake of fact then s.39 would again be pointless, in its requirement as to an allegation of malice, since such a mistake will always negative malice. Similarly, a bona fide mistake of law, and more particularly on a difficult question of law, would not be evidence of an absence of reasonable and probable cause. See Phillips v. Naylor (1859) 4 H. & N. 565; Johnson v. Emerson (1871) L.R. 6 Ex. 329.

Having examined the cases cited - as also those to which no reference was made - by the Court in Murphy v. Richards (supra), and the English cases prior to Griffith v. Naylor (supra), I am compelled to the clear conclusion that those two cases do not accord with the weight of judicial opinion and authority which preceded them. As to McKane v. Parnell (1956) 7 J.L.R. 32, I do not regard that case as lending any assistance to the solution of the second problem posed in this

appeal.

In this case the magistrate has found an absence of malice in the respondent. This finding was, on the evidence, fairly open to him and cannot be distrubed. He also found that there was no absence of reasonable or probable cause for the arrest of the appellant. In the particular circumstances of this case this latter finding was, in my view, an eminently reasonable one. I would dismiss the appeal.

ADDENDUM

Since signing the stencilled copy of my judgment herein I have discovered that the last paragraph thereof does not, by the omission of four sentences, agree with the original draft. This paragraph should read as follows:

In this case the magistrate has found an absence of malice in the respondent. This finding was, on the evidence, fairly open to him and cannot be disturbed. He also found that there was no absence of reasonable or probable cause for the arrest of the appellant. In the particular circumstances of this case this latter finding was, in my view, an eminently reasonable one. Having found that the respondent was, in the relevant circumstances, entitled to arrest the appellant, the magistrate was entirely justified in finding reasonable and probable cause for that arrest. Does a conclusion as to the unlawfulness of the appellant's arrest in any way alter the result of this appeal? I think not. In my view where a constable acts under a genuinely mistaken notion as to his authority to arrest under a statute - as is obviously the case here - he does not, on that account alone, and for the reasons I have advanced earlier in this judgment, lose the protection given him by s. 39 of Cap. 72.